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**In the Supreme Court
OF THE
United States**

OCTOBER TERM 1971

No. 71-1698

UNITED STATES OF AMERICA, *Petitioner*
vs.
CECIL J. BISHOP

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Was the court of appeals correct in holding that Section 7207 of the Internal Revenue Code of 1954 (26 U.S.C.) is a lesser included offense of Section 7206(1) of that Code?

ARGUMENT

A defendant is entitled to a lesser included offense instruction where some (but not all) of the elements of the offense charged themselves constitute a lesser

offense. However, no such instruction is proper where the facts to be resolved by the jury are the same as to both the lesser and greater offenses. *Sansone v. United States*, 380 U.S. 343 (1965); *Berra v. United States*, 351 U.S. 131 (1956); *Spies v. United States*, 317 U.S. 492 (1943). The parties agree, and the court of appeals found (Pet. 17), that, with the exception of the element of willfulness, the elements of the felony and the misdemeanor here involved are the same. Thus, the court of appeals' decision turned on its holding that in income tax prosecutions "the word 'willfulness,' as used in a misdemeanor statute, . . . mean[s] something less than the same word 'willfulness' used in a felony statute. [Citations omitted]." (Pet. 16)

1. This Court has long held that the requirement of willfulness in a tax felony prosecution is different from and greater than the same requirement in a tax misdemeanor prosecution. *United States v. Murdock*, 290 U.S. 389 (1933)¹; *Spies v. United States*, *supra*. Twice during its October Term, 1969 this Court refused to review decisions of two circuits applying a lower standard of willfulness in tax misdemeanor prosecutions. *United States v. Fahey*, 411 F. 2d 1213

¹Petitioner suggests that the Court in *Murdock* limited its lower standard of willfulness to cases not involving turpitude. (Pet. 10, fn. 7) In that decision, however, this Court cited cases in support of its position which applied the lower standard of willfulness to offenses involving turpitude. E.g. *Clay v. State*, 52 Tex. Cr. R. 555, 107 S.W. 1129 (1908) (Perjury); *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427 (1921) (Battery); *State v. Savre*, 129 Iowa 122, 105 N.W. 387 (1904) (Vote fraud). In addition, this Court indicated in *Spies v. United States*, *supra*, 497-498 that such lower standard applied to tax misdemeanors.

(C.A. 9, 1969), cert. denied 376 U.S. 957²; *United States v. Matosky*, 421 F. 2d 410 (C.A. 7, 1970), cert. denied 398 U.S. 904. Since there are two standards of willfulness in tax prosecutions, one applying to felonies and the other to misdemeanors, there was a disputed element entitling the respondent to a lesser included offense instruction.

2. The court of appeals decision does not conflict with this Court's decision in *Sansone v. United States, supra*. In *Sansone*, on the facts peculiar to that case, the Court held that a lesser included offense instruction was not appropriate³. Petitioner places principal reliance for its position on an isolated passage in that opinion (quoted at Pet. 7-8) which states that if certain actions were willful in connection with violating Sec. 7201, they were willful in connection with violating Sec. 7207. That passage, if taken alone and out of context, might be deemed to support petitioner's argument here. It might also be considered as stating a much lower standard of willfulness in tax felony cases than that for which the petitioner now contends. However, a reading of the balance of the opinion shows that the Court was analyzing the particular evidence in that case and not establishing a standard of willfulness in conflict with that of the court of appeals decision below. This is apparent from

²The court of appeals in the instant case based its decision in part upon the *Fahey* case (Pet. 16).

³The Court was primarily concerned with whether an intent to pay the tax at a later date vitiated taxpayer's admission that he knew that he had underreported his income. *Sansone v. United States, supra*, pp. 344-345. The instant case presents no comparable facts.

the latter portion of the *Sansone* opinion, where the Court reached but did not decide the question of whether the word "willful" had the same meaning under Sec. 7201 and Sec. 7207. Instead, it merely stated that an intent to report and pay tax at a future date does not vitiate the willfulness required for conviction of either the felony or the misdemeanor. *Sansone v. United States, supra* 354.

Petitioner argues that, in an income tax case, Sec. 7206(1) and Sec. 7207 are the same and that such argument is dictated by the opinion in *Sansone*. That argument is itself in conflict with *Sansone*, since it would presume that Congress enacted two sections that are identical except as to penalty. Such a presumption was expressly rejected by this Court in *Sansone*⁴. Petitioner's argument is an attempt to elevate the factual analysis in *Sansone* to a broad holding overruling prior decisions of long standing in *United States v. Murdock, supra* and *Spies v. United States, supra*. It is submitted that petitioner's position is incorrect and that the instant case is consistent with *Sansone, Murdock* and *Spies*.

3. The decision of the court below reaches a different result from that reached on the same issue in *Escobar v. United States*, 388 F.2d 661 (C.A. 5, 1967), cert. denied, 390 U.S. 1024⁵. The Fifth Circuit in

⁴See fn. 6, *infra*.

⁵On petition for certiorari to this Court, the parties in *Escobar* dealt with whether the Government was required to prosecute under Sec. 7207 rather than Sec. 7206(1) and not with whether a lesser included offense instruction was required. Memorandum for United States in Opposition, p. 2. However, whether there is a difference in the meaning of willfulness in felony and misdemeanor prosecutions was never raised in this Court or the court of appeals.

Escobar based its decision on the absence of any factual dispute as to whether the returns involved were made under the penalties of perjury⁶. It apparently did not consider whether the difference in the standard of willfulness in misdemeanor and felony prosecutions constituted an operative difference between the two codes sections. Until the Fifth Circuit decides this specific issue, review of the issue by this Court to resolve an apparent conflict is premature since the Fifth Circuit may well resolve this conflict consistently with the opinion below.

Petitioner also contends that there is a conflict between the decision in this case and the decisions in *United States v. Vitiello*, 363 F. 2d 240 (C.A. 3, 1966) and *Haner v. United States*, 315 F. 2d 792 (C.A. 5, 1963) which purportedly hold that the standard of willfulness is the same in tax felony and misdemeanor prosecutions. However, petitioner has repeatedly represented to this Court that there is no such conflict and that willfulness has different meanings in felony and misdemeanor contexts. In his Brief in Opposition in *Abdul v. United States* (October Term, 1960,

⁶Petitioner placed reliance on that same factor in its brief below (at p. 9) but apparently abandons the contention here. As the court of appeals pointed out (Pet. 17, fn. 3), all income tax returns are required to be made under penalty of perjury (Internal Revenue Code of 1954, Section 6065(a) (26 U.S.C.); Treasury Regulations on Income Tax (1954 Code), §1.6065-1(a) (26 C.F.R.)) so that the element of penalty of perjury is present in both sections. Therefore, if petitioner is correct in arguing that the requirement of willfulness is the same for Section 7206(1) and 7207, both Sections are identical as applied to income tax prosecutions. This Court, however, has been "unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States*, *supra*, at 348. Accord: *Spies v. United States*, *supra*, at 497.

No. 104), the Solicitor General states (pp. 4-5):

Despite the petitioner's assertion to the contrary (Pet. 20-29), the element of willfulness in the context of charges of failure to file tax returns [a misdemeanor] need not be defined in the precise terms of "evil motive *** bad faith or evil intent." In *Spies v. United States* 317 U.S. 492, 497-498, this Court, differentiating between the meaning of willfulness in connection with misdemeanor and felony charges, pointed out that "[m]ere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness," where the charge involved a failure to file.

* * *

Similar instructions were upheld on the previous appeal, *Abdul v. United States*, 254 F. 2d 292 (C.A. 9),⁷ and have been sustained in other circuits. *Ripperger v. United States*, 230 F.2d 56 (C.A. 4); *United States v. Littman*, 246 F. 2d 206 (C.A. 3); *Haskell v. United States*, 241 F. 2d 790 (C.A. 10).

Then in the Brief for the United States in Opposition in *Matosky v. United States* (October Term, 1969, No. 1350) the following appears at pp. 5-6:

This case involves no conflict in authority. Only this Term the Court denied a petition for certiorari presenting the same question presented here. See *Fahey v. United States*, 396 U.S. 957, rehearing denied, 396 U.S. 1063. Petitioner's reliance (Pet. 7) on *Haner v. United States*, 315 F.

⁷It was this case from which the court of appeals quoted its standard of willfulness in its opinion below. (Pet. 16-17)

2d 792 (C.A. 5), and *United States v. Vitiello*, 363 F. 2d 240 (C.A. 3), is misplaced. In each of these cases a conviction was reversed because the court of appeals believed the instructions would have permitted a conviction under Section 7203 merely on the finding of careless or negligent conduct. No such instructions were given here; the jury was told that "willfully" in Section 7203 "means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent or negligent conduct" (Pet. 6).

See Brief for the United States in Opposition in *Fahey v. United States*, (October Term, 1969, No. 576) at pp. 7-8.

Thus, as petitioner has conceded in other cases, there is no clear-cut conflict with the Ninth Circuit's dual standard of willfulness in tax prosecutions. Some circuits, as in *Haner* and *Vitiello*, have required that the lower standard for misdemeanor conviction be limited to preclude conviction for mere negligence. However, on the issues involved here, neither *Haner* nor *Vitiello* is in conflict with the Ninth Circuit's definition of willfulness.

4. There is no merit to petitioner's contention that the instant case will adversely affect the criminal process in the Ninth Circuit. Its argument that a jury may acquit a defendant guilty of a felony and convict of a misdemeanor assumes both offenses to be identical. We have shown that the offenses are not iden-

tical. Instructions differentiating the two standards of willfulness formulated by the court of appeals will enable a jury to reach a proper verdict.*

We find it difficult to credit the petitioner's concern that defendants will be convicted on a finding of mere carelessness, in view of the fact that the petitioner has always attempted, with considerable success, to have the lower standard of willfulness, of which it now complains, applied in misdemeanor tax prosecutions and has consistently resisted attempts by defendants who were thus convicted to obtain review by this Court. (See excerpts from Briefs for the United States in Opposition in the *Abdul* and *Matosky* cases, *supra*.)

Finally, petitioner fails to justify its argument that the standards of willfulness adopted by the Ninth Circuit will be applied in non-tax offenses. The court of appeals specifically limited its holding below to income tax prosecutions (Pet. 16), undoubtedly because it was aware that offenses under the income tax laws constitute a logical hierarchy in which a felony frequently includes lesser offenses. *Spies v. United States*, *supra*, at 497. Should the Ninth Circuit later extend its rule to other offense where the rule is not proper, petitioner may seek review by this Court. The instant case, however, involves only an income tax prosecution.

*It is of course axiomatic that any lesser included offense instruction impinges in some degree upon the prosecutor's discretion. Nevertheless, the lesser included offense instruction has long been part of our jurisprudence. Schmidt and Thatcher, *Lesser Included Income Tax Offenses*, 17 Tax L. Rev. 463, 467-468 (1961).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, July 21, 1972.

Respectfully submitted,
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